EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

87-1222

NO.

Supreme Court, U.S.
FILED
DEC 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

ALTON J. HOUSTON,
Petitioner

versus

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX

ADOLPH J. LEVY
518 South Rampart Street
New Orleans, Louisiana 70113
(504) 586-9707
Attorney for Petitioner

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

TABLE OF CROSS-REFERENCES FROM

PETITION FOR WRIT OF CERTIORARI

TO REVISED APPENDIX

PAGE IN ORIGINAL APPENDIX	PAGE IN REVISED APPENDIX
A-1	A-1
A-4	A-7
A-6[1]	A-109
A-7-8	A-12-14
A-9	A-16
A-14	A-25
A-18	A-34
A-19	A-34
A-22	A-41
A-23	A-43
A-24	A-45-46
A-44	A-77
A-45	A-79
A-46	A-81

[1] This should have been typed A-61.

A-47
A-49
A-54-55
A-60
A-63
A-82
A-86-87
A-96
A-107
A-113

APPENDIX A

I. Opinion of United States Court of Appeals for the Fifth Circuit.

Alton J. HOUSTON, Plaintiff-Appellee, Cross-Appellant,

v.

UNITED STATES POSTAL SERVICE, et al., Defendants-Appellants, Cross-Appellees.

No. 85-3639.

United States Court of Appeals, Fifth Circuit.

Aug. 13, 1987.

Before WISDOM, JOHNSON and GARWOOD, Circuit Judges.

GARWOOD, Circuit Judge:

The question in this Federal Tort Claims Act case is whether the district court had jurisdiction to try Alton Houston's suit against the United States. We hold that the lower court lacked juris-

diction and accordingly reverse the judgment below and dismiss the case.

Facts and Proceedings Below

When the events giving rise to this suit occurred, Alton Houston was a laborer for the New Orleans Sewerage and Water Board. On January 27, 1976, he was sitting in a large city truck parked in a crowded New Orleans street when a United States Postal Service (USPS) van, clearly marked as such, collided with the mirror of the city truck. Except for the shattered mirror, the truck was not damaged.

According to Houston, this impact caused him a variety of injuries, including back problems and alcohol dependency. These injuries reduced his earning potential. The district court found in Houston's favor and held the United States liable for $121,887.20.

The procedural history of the case is

quite important. On January 27, 1977, one year after the collision, Houston sued the United States; Joseph Howard, the driver of the postal van; and the USPS in Louisiana court. Pursuant to his direction, process was not issued or served.

Just under two years after the accident, on January 17, 1978, Houston filed an administrative claim with the USPS. As we will explain, the filing of such an administrative claim within two years after its accrual was required by the Federal Tort Claims Act (FTCA) (codified at 28 U.S.C. §§ 1346(b), 1402(b), 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680). About three months after this claim was filed, the USPS notified Houston's attorney of its denial. That notification letter, dated April 26, 1978, stated, "[I]f your client is dissatisfied with the final action on his clain [sic], he may

file suit in an appropriate United States District Court not later than six months from the date of this letter." (Emphasis added.) The six-month limitations period explained in the letter is codified at 28 U.S.C. § 2401(b). Houston's counsel stated during oral argument in this court that the denial letter was not "diaried" on a "prescription card" at his law firm. Because of this oversight, it was not until April 23, 1980, almost two years after the administrative denial, that Houston for the first time caused process in his Louisiana court suit to be served on the defendants therein.

After being served, the United States removed the case to federal court, as authorized by 28 U.S.C. §§ 1441(a) and 1442(a)(1). (For some reason, the United States did not rely on the FTCA removal statute--28 U.S.C. § 2679(d).) The USPS

and the United States moved to dismiss the case on grounds that the United States was the only proper defendant and Houston had not sued it within six months of the administrative denial of his claim.

The district court dismissed the USPS (and Howard), but denied the dismissal motion as to the United States. In a thorough opinion, the court reasoned that Houston's state court suit sufficed as timely compliance with the limitations requirement of the FTCA. Because the district court considered the state suit sufficient under the FTCA, it did not view Houston's long delay in serving process as a jurisdictional defect. After a bench trial that covered portions of three days, the court rendered judgment for Houston.

The United States appeals the judgment asserting that the district court lacked jurisdiction to try the case due to

Houston's alleged noncompliance with the FTCA limitations period. Houston cross-appeals, complaining that the district court's $25,000 award for pain and suffering is too low.

Discussion

Essentially, this case raises only two questions: (1) whether the FTCA's procedural requisites apply to a tort claim arising out of a collision with a government vehicle; and, (2) if the FTCA's procedural requirements apply, whether Houston complied with them. We answer "yes" to the first question and "no" to the second.

I.

"The United States, as sovereign, is immune from suit save as it consents to be sued...." United States v. Sherwood, 312 U.S. 584, 61 S.Ct. 767, 769, 85 L.Ed. 1058 (1941). In construing waivers of sove-

reign immunity, courts are not free to extend or narrow the waiver beyond what Congress intended. United States v. Kubrick, 444 U.S. 111, 100 S.Ct. 352, 357, 62 L.Ed.2d 259 (1979). These familiar axioms undergird our analysis.

In various statutes through the years, Congress has carved into the immunity of the federal government. See generally Hulen, Suits on Tort Claims Against the United States, 7 F.R.D. 689, 689-90 (1948) (discussing, inter alia, the Tucker Act); Comment, Administrative Claims and the Substitution of the United States as Defendant Under the Federal Drivers Act: The Catch 22 of the Federal Tort Claims Act?, 29 Emory L.J. 755, 758 (1980) (citing several statutory examples of sovereign immunity waiver). An important such waiver occurred in 1946, when Congress passed the FTCA. See Hulen, 7

F.R.D. 689 (explaining the original version of the FTCA). The FTCA provides that the United States is liable for damages "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 2675(a).[1]

---

[1] The Postal Reorganization Act of 1970, codified as Title 39 of the United States Code, waives sovereign immunity "with respect to the Postal Service." Franchise Tax Bd. of Calif. v. U.S. Postal Service, 467 U.S. 512, 104 S.Ct. 2549, 2553, 81 L.Ed.2d 446 (1984) (footnote omitted). Section 409(c) of Title 39 states that "[t]he provisions of chapter 171 [the FTCA] and all other provisions of title 28 relating to tort claims shall apply to tort claims arising out of

The FTCA as originally enacted did not abolish the plaintiff's action against the negligent government employee. The plaintiff could "sue the employee by asserting his common law right against the tortfeasor or go against the government on the basis of respondeat superior." Note,

---

activities of the Postal Service."

In conditioning the waiver of immunity for the USPS on the provisions of the FTCA, the Congress ensured that "[a]ny tort claim against the USPS must be cognizable under the FTCA." McCollum v. Bolger, 794 F.2d 602, 608 (11th Cir.1986) (per Wisdom, J.), cert. denied, ___ U.S. ___, 107 S.Ct. 883, 93 L.Ed.2d 836 (1987); see Insurance Co. of N. America v. United States Postal Service, 675 F.2d 756, 758 (5th Cir.1982). Section 409(c) incorporates the FTCA, but it does not enlarge or diminish the terms of the FTCA.

The Constitutionality and Basic Fairness of the Government Drivers Law, 54 Minn.L. Rev. 645, 651-52 (1970) (footnotes omitted); see also Murdock, The Federal Government as an Insured Under an Employee's Auto Insurance Policy, 36 Mil.L.Rev. 91, 94 (April 1967) (noting that under the original FTCA the "plaintiff could always choose to ignore the FTCA remedy and sue the employee in an appropriate state court"); Comment, 29 Emory L.J. at 755 (1980) (same). Some government employees succeeded in procuring indemnification from the government through passage of private relief bills. S.Rep. No. 736, 87th Cong., 1st Sess., reprinted in 1961 U.S. Code Cong. & Ad. News 2784, 2794; Stevens, Scope of Employment and the Government Motor Vehicle Operator, JAG L.Rev. 13, 14 (Jan.-Feb. 1966). This procedure was expensive and time-consum-

ing, and not all employees pursued it. In response to the problem, Congress in 1961 amended the FTCA by adding four subsections to 28 U.S.C. § 2679. Act approved September 21, 1961, Pub.L. No. 87-258, 75 Stat. 539 (1961). The amendment, known as the Federal Drivers Act (FDA), deprived plaintiffs whose injuries arose from the negligent operation of a government vehicle of any claim against the driver in his individual capacity. "The remedy by suit against the United States as provided by [28 U.S.C.] section 1346(b) ... shall hereafter be exclusive of any other civil action or proceeding...." Section 2679(b) (1961 version) (emphasis added). The design and effect of the FDA was to relieve government drivers "from the hazard of personal liability stemming from driving motor vehicles in the course of official duty." L. Jayson, Handling Fede-

ral Tort Claims § 175.03[1], at 6-17 and 6-18.4 (1986) (footnote citing cases omitted).

In 1966, Congress again extensively amended the FTCA. Act approved July 18, 1966, Pub.L. No. 89-506, 80 Stat. 306 (1966). The amendments imposed a requirement that all tort claimants seek administrative relief before turning to the courts. See U.S.C. §§ 2401(b), 2675(a). Congress was motivated by a desire to reduce congestion in the courts and by statistics showing that most claims against the government were settled, thus suggesting that an administrative scheme could be very effective. S.Rep. No. 1327, 89th Cong., 2d Sess., reprinted in 1966 U.S. Code Cong. & Ad.News 2515, 2516-18; Rise v. United States, 630 F.2d 1068, 1071 (5th Cir.1980) (recognizing these as the reasons for the administrative exhaustion

requirement); Comment, 29 Emory L.J. at 766. The FDA, subsumed in section 2679(b)-(d) of the FTCA, which had previously referred to the plaintiff's exclusive remedy "by suit" was changed to read, "The remedy against the United States provided by sections 1346(b) and 2672 of this title ... shall hereafter be exclusive...." Section 2679(b) (emphasis added). Congress' substitution of the administrative remedies provision, section 2672, for the phrase "by suit" strongly suggests that Congress intended FDA cases to begin with an administrative claim, not a lawsuit. This interpretation is borne out by the legislative history, which states that this change in the FDA was designed to "make it conform" with the administrative exhaustion requirement. S.Rep. No. 1327, 89th Cong., 2d Sess., reprinted in 1966 U.S. Code Cong. &

Ad.News 2515, 2521.

Houston argues that the amendment adds an administrative claim as a possible remedy, without eliminating the remedy by suit.[2] Admittedly, Congress could have

---

[2] Section 2679(b)-(d) obviously contemplates that lawsuits can be filed in state court against the individual, for a removal mechanism is provided. But the fact that a claim can be filed does not mean that it can proceed to adjudication on the merits without first being presented for administrative consideration. The most obvious reason to permit suits to be filed against the driver is to toll the state limitations period so that plaintiff preserves his claim against the negligent driver in the event it is later determined that the driver was not acting within the scope of

made the matter clearer by incorporating section 2675(a) within the FDA. Section 2675(a) says, "An action shall not be instituted" until the administrative claim is denied. See Comment, 29 Emory L.J. at 782 (discussing this ambiguity in section 2679(b)). But the interpretation suggested by Houston underestimates Congress' deletion of the phrase "by suit" from section 2679(b) and, more importantly, Houston's interpretation would undermine the goals of efficient administrative settlement and reduced congestion in the courts that Congress sought to achieve by the 1966 amendments.

Finally, it would not be logical to assume that Congress imposed an admini-

---

his employment. See McGowan v. Williams, 623 F.2d 1239, 1242 (7th Cir.1980); 28 U.S.C. § 2679(d) (providing for remand to state court in such a case).

strative exhaustion requirement for all tort claims against the United States, except for claims arising from collisions with government vehicles. We see no distinction between the two types of claims, and nothing in the FTCA or its legislative history suggests that Congress did either. In sum, the statute's organization and language, considered in light of the problems that Congress sought to correct with the 1961 and 1966 amendments, lead us to conclude that FDA claims are subject to the administrative exhaustion requirements and limitations periods of the FTCA.

Our interpretation is consistent with the majority of cases discussing the FTCA in its post-1966 era. See, e.g., Henderson v. United States, 785 F.2d 121, 123 (4th Cir. 1986) (dismissing claim arising from collision with USPS vehicle for failure to file administrative claim

within section 2401(b) limitations period); Rogers v. United States, 675 F.2d 123, 124 (6th Cir.1982) (same); Bialowas v. United States, 443 F.2d 1047, 1049 (3d Cir.1971) (same); Meeker v. United States, 435 F.2d 1219, 1222 (8th Cir.1970) (same); Wilkinson v. United States, 677 F.2d 998, 1000 (4th Cir.) (affirming dismissal of claim arising from collision with automobile driven by a serviceman while on duty because claimant failed to seek administrative relief), cert. denied, 459 U.S. 906, 103 S.Ct. 209, 74 L.Ed.2d 167 (1982); Wollman v. Gross, 637 F.2d 544 (8th Cir.1980) (affirming dismissal of claim arising from collision with automobile driven by employee of the Agricultural Stabilization and Conservation Service because plaintiff's claim for administrative relief was untimely), cert. denied, 454 U.S. 893, 102 S.Ct. 389, 70 L.Ed.2d

207 (1981); United States v. LePatourel, 571 F.2d 405, 410 (8th Cir.1978) (reversing district court's refusal to dismiss claim arising from collision with vehicle driven by a federal judge because claimant failed to seek administrative relief), modified to apply prospectively, 593 F.2d 827 (8th Cir.1979) (en banc); cf. Miller v. United States, 741 F.2d 148, 150 (7th Cir.1984) (reversing the dismissal of claim arising from collision with USPS vehicle because within six months of the administrative denial state court suit against individual was filed and removed to federal court, thus timely making the United States a proper party); McGowan v. Williams, 623 F.2d 1239, 1242-43 (7th Cir.1980) (reversing dismissal of claim because state suit against the individual, filed after administrative denial, met the FTCA's requirements even though case was

not removed to federal court until after the limitations period expired).

Two cases--one from the Second Circuit, the other from the Ninth--are out of step with the majority view because they hold that a plaintiff can avoid the FTCA's procedural requirements by filing suit against the government driver in state court. Staple v. United States, 740 F.2d 766, 768 (9th Cir.1984); Kelley v. United States, 568 F.2d 259, 266 (2d Cir.), cert. denied, 439 U.S. 830, 99 S.Ct. 106, 58 L.Ed.2d 124 (1978); see L. Jayson, supra, § 175.03[2] at 6-27 (describing Kelley as the "minority view"); Comment, 29 Emory L.J. at 775 (describing Kelley as "the first and only decision" to hold as it did; this was written prior to Staple). However, we must respectfully reject Staple and Kelley insofar as they permit a plaintiff who

knows or should know that the negligent driver was a government employee to circumvent the FTCA's administrative exhaustion requirement by filing a state suit against only the driver. See Harris v. Burris Chemical, Inc., 490 F.Supp. 968, 970 (N.D.Ga.1980) (noting that Kelley can be read to permit such a result and criticizing such a broad rule).

The facts of Staple illustrate the undesirability of such a rule. After a traffic accident with a USPS vehicle, Lillian Staple filed a state suit against the driver and the USPS. Then she filed an FTCA administrative claim, which was denied. More than a year after this denial, she served process in her state

suit for the first time.[3] The United States certified that the driver was acting in the scope of his employment, removed the case, and sought dismissal on the ground that the plaintiff's state court suit preceded her request for administrative relief, and was thus untimely under section 2675. The district court granted the government's motion, but the Ninth Circuit reversed. That court held that the FTCA's administrative exhaustion requirements and the limitations period in which to file suit after

---

[3] Exactly six months after the denial, Staple had filed a federal court suit against the driver and USPS; this suit was dismissed by the district court because the United States was not named a defendant. See 28 U.S.C. § 2679(a). Staple did not appeal the dismissal. 740 F.2d at 768.

administrative denial apply only to suits brought directly against the United States, and not to state suits brought against the driver. 740 F.2d at 769. The Ninth Circuit's holding exposed the United States to a claim that in no way complied with the prerequisites of the FTCA. We believe this is inconsistent with the congressional intent.

We prefer the approach taken by the Fourth Circuit in Henderson v. United States, 785 F.2d 121 (4th Cir.1986). The court rejected the contention that a state court suit against the individual satisfies the FTCA, and noted that whether plaintiff argues that a state suit against the driver obviates the need for administrative exhaustion or suffices as an administrative claim, the practical effect is the same.

"In neither instance is a claim pre-

sented by the claimant to the appropriate federal agency as required by law. Instead of our current, relatively straightforward system in which all claims must be presented to the relevant agency, we open a door for the multitude of plaintiffs' arguments that the administrative filing requirement was satisfied because the agency was aware of, or had notice of, their claims." 785 F.2d at 125.

See also Meeker v. United States, 435 F.2d 1219, 1221 (8th Cir.1970) (discussing the same issue and commenting, "We think that the purpose of the 1966 amendment to the Act establishing a statutory scheme for initial agency consideration of tort claims ... cannot be so easily defeated."). Henderson held that FDA claims are governed by the administrative

exhaustion requirements and limitations periods of the FTCA.

Like other courts, we recognize the quandary in which a plaintiff may find himself if he has no reason to suspect that the defendant driver is a government employee. See, e.g., Kelley, 568 F.2d at 266; McGowan v. Williams, 623 F.2d 1239, 1243 (7th Cir.1980); Driggers v. United States, 309 F.Supp. 1377, 1379 (D.S.C.1970); see also Comment, 29 Emory L.J. 755, 768-69 (same). An unsuspecting plaintiff will sue only the individual driver and have no reason to pursue the requisite administrative remedies. Then, after the two-year limitations period has expired, the government may certify that the individual was acting in the scope of his employment, remove the case, and procure dismissal on the ground that plaintiff is left without a remedy. Apprehen-

sion of such "sandbagging" underlies Kelley's holding that plaintiffs injured in collisions are not subject to the FTCA's administrative exhaustion requirement. See, e.g., Wollman, 637 F.2d at 549 (distinguishing Kelley on this basis); Reiser v. Di Pietro, 78 F.R.D. 541, 542 (N.D.Ill.1978) (same). In the present case, however, Houston was not ignorant of the fact that Howard was in the course of his employment for the USPS. The postal van was clearly marked as such, and Houston's knowledge is conclusively demonstrated by the fact that he sued the United States and USPS in state court and timely filed an FTCA administrative claim.[4]

---

[4] Most courts reject the Kelley view that when plaintiff did not know that the driver worked for the United States he may

ignore the FTCA's prerequisites. For example, in declining to follow Kelley, the Sixth Circuit stated, "There is no equitable exception to the jurisdictional prerequisites of the Federal Tort Claims Act in this Circuit and we decline to create one." Rogers, 675 F.2d at 124. See also Dunaville v. Carnago, 485 F.Supp. 545, 548 (S.D.Ohio 1980); Fuller v. Daniel, 438 F.Supp. 928, 930 (N.D.Al.1977); Driggers, 309 F.Supp. at 1379; see generally Note, Federal Tort Claims Act, 49 Tex.L.Rev. 165 (1970) ("Since the FTCA requirements are jurisdictional in nature, the federal district courts are without authority to remedy the plaintiff's predicament.") We believe the majority view is persuasive, but the facts of this case do not require

Therefore, we hold that before the United States is forced to defend a tort suit arising from a collision between a private vehicle and a government vehicle, the plaintiff--at least one who knows or should know that the driver was a government employee--must meet the FTCA's administrative exhaustion requirements and then timely commence suit against the government as provided by 28 U.S.C. § 2401(b).

II.

Having concluded that Houston's claim was subject to the FTCA, we must ascertain whether he met the jurisdictional prerequisites of that statute. We hold that Houston did not comply with the FTCA.

The applicable limitations period is stated in 28 U.S.C. § 2401(b):

"A tort claim against the United

---

us to decide that question.

States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented."

Though phrased in the disjunctive, this statute requires a claimant to file an administrative claim within two years and file suit within six months of its denial. Willis v. United States, 719 F.2d 608, 612 (2d Cir.1983) (per Friendly, J.); Dyniewicz v. United States, 742 F.2d 484, 485 (9th Cir.1984); Schuler v. United States, 628 F.2d 199, 201 (D.C.Cir.1980); cf. Reynolds v. United States, 748 F.2d 291 (5th Cir.1984) (dismissing amended

complaint brought against United States after the expiration of the six-month period, even though plaintiff had timely filed an administrative claim).

These limitations periods are jurisdictional. Equitable considerations that may waive or toll limitations periods in litigation between private parties do not have that same effect when suit is brought against the sovereign. E.g., Goff v. United States, 659 F.2d 560, 561 (5th Cir.1981). This is so because under the doctrine of sovereign immunity the government's exposure to liability can be no greater than it permits. Id.; see also Gregory v. Mitchell, 634 F.2d 199, 204 (5th Cir.1981) (filing of suit within six months of administrative denial is a jurisdictional requirement); Carr v. Veterans Administration, 522 F.2d 1355, 1357 (5th Cir.1975) (stating that because it is

a waiver of sovereign immunity, the six-month filing requirement must be followed strictly); Quinton v. United States, 304 F.2d 234, 242 (5th Cir.1962) (Hutcheson, J., concurring) ("Section 2401(b) is not a statute of limitations, within the legal definition of that term, ... it imposes ... a jurisdictional prerequisite to recovery...."); L. Jayson, supra § 275.02 (discussing the apparently unanimous view that section 2401(b) is a jurisdictional prerequisite). A recapitulation of the procedural history of this case shows why the district court had no jurisdiction.

Within two years of the accident, Houston sued the USPS, Joseph Howard, and the United States in state court. Houston then timely filed an FTCA administrative claim. After the April 26, 1978 denial of this claim, Houston had six months to file suit against the United States. However,

Houston has never filed suit in federal court. Nor did he serve process on any of the defendants in his premature state suit until almost two years after the administrative denial. In short, Houston did nothing between the time that the USPS denied his claim and the expiration of the six-month limitations period.

Houston proffers three arguments to extricate himself from this predicament. First, relying on Staple and Kelley, he argues that his claim against the United States is not subject to the six-month limitations period in section 2401(b). However, for the reasons given in Part I, we have rejected Staple and Kelley. Second, Houston distinguishes cases, such as Henderson and Meeker, dismissing claimants who failed to file an administrative claim by pointing out that he did file an administrative claim. Apparently we are

to believe that these cases do not apply to Houston. This reasoning is unpersuasive. The FTCA either applies or not. If Houston was required to pursue his claim by the methods and in the time provided by the FTCA, as we held in Part I, then his compliance with the administrative exhaustion requirement does not excuse his failure to timely file suit. Halfway compliance with section 2401(b) is not enough.

Houston's third line of reasoning is that his state court suit tolls the six-month limitations period. For this proposition, he relies on McGowan v. Williams, 623 F.2d 1239, 1241 (7th Cir.1980). The Seventh Circuit held that a state suit against the driver and the government agency, timely commenced after administrative denial, complied with section 2401(b), even though the action was not removed to federal court, and thus the

United States was not made a formal party, until the limitations period had expired. See also Whistler v. United States, 252 F.Supp. 913 (N.D.Ind.1966) (pre-1966 amendments case; suit filed against individual in state court tolls statute as to United States). We need not decide whether McGowan states the proper rule, because it is distinguishable on two grounds.

First, McGowan the driver "received proper notice of the plaintiff's action within the time limitation of Section 2401(b)." 623 F.2d at 1244. The court deemed this to be notice on the United States. Id. By contrast, Houston did not serve any defendant within the six-month limitations period. Second, unlike the plaintiff in McGowan, Houston is relying on a suit brought before he had exhausted his administrative remedies. No court

could have tried his case then. Cf. Reynolds v. United States, 748 F.2d 291, 293 (5th Cir.1984) (holding that a tardy amendment naming the United States as defendant in an FTCA claim could not confer jurisdiction on the court even if the amendment related back to the time suit was commenced because that suit had been filed prior to administration exhaustion).

This latter distinction is especially important. Had the United States been served with process in Houston's state suit, it no doubt would have removed the case to federal court, where the judge would have had to dismiss the case for lack of jurisdiction. See L. Jayson, supra § 175.03[2], at 6-26. This is so because the statute granting exclusive federal jurisdiction to hear tort claims against the United States, 28 U.S.C. § 1346(b), is expressly subject to the pro-

visions of the FTCA, and Houston had not exhausted his administrative remedies, as required by section 2675(a), at the time he commenced his state suit. Reynolds, 748 F.2d at 292. Like the federal court, the Louisiana court could not have adjudicated Houston's claim. The state courts have no jurisdiction to hear even properly exhausted tort claims against the United States. 28 U.S.C. § 1346(b) (vesting exclusive jurisdiction over FTCA cases in the federal courts). The state court also could not have adjudicated Houston's claim against the driver or the USPS because Houston's exclusive remedy was against the United States. 28 U.S.C. § 2679(b). Thus, Houston's state court suit served only to toll the Louisiana limitations period for any later claim to be brought against Howard in the event that he was not acting within the scope of his employ-

ment. See note 2, supra. At the time it was filed, the suit itself could not have been the vehicle for recovery from the United States. The mere pendency of this defective suit during the six-month limitations period, a suit the United States was not formally notified of until must later, did not begin an action under section 2401(b).[5]

---

[5] The result might be different in a case where plaintiff has filed a premature suit against the driver in federal court based on diversity jurisdiction, and then amended his suit to name the United States within the six-month limitations period. The formal ritual of refiling would arguably serve no practical purpose. In dictum, the Third Circuit has suggested that jurisdiction would be established in those circumstances. Morano v. U.S. Naval

Hospital, 437 F.2d 1009, 1011 (3d Cir.1971). We do not reach the question of whether Reynolds forecloses a finding of jurisdiction in those circumstances. Cf. Edwards v. United States, 755 F.2d 1155 (5th Cir.1985) (adding United States as party and effecting service on it within six months is sufficient where suit, though not premature, did not initially name United States).

In this case, it also might be arguable that if the United States had been served in the six months after the administrative denial, and had removed the case to federal court within that time, an action would have timely commenced under section 2401(b) even though the original state suit was premature. Such a theory might even extend to a possibly colorable

Houston relies on a purported absence of prejudice to the government in defending this suit, as well as asserted equities in his favor. However, these factors are not sufficient to overcome the govern-

---

assertion of jurisdiction if the United States, served in the sixth months after administrative denial, deliberately "sandbagged" plaintiff by waiting until the limitations period expired before removing the case. We do not suggest answers to these questions but rather leave their resolution for another day because the facts of this case do not require us to answer them. We strongly emphasize, however, that in FTCA (and FDA) cases prudent plaintiffs will always institute a fresh suit against the United States in federal court sometime in the six months that follow the administrative denial.

ment's immunity to suit. Cf. Childers v. United States, 442 F.2d 1299, 1303 (5th Cir.) (holding against plaintiff whose suit after administrative denial was untimely because confusion at the law firm representing plaintiff caused the denial letter to be filed without ever having been read), cert. denied, 404 U.S. 857, 92 S.Ct. 104, 30 L.Ed.2d 99 (1971). Only by carefully averting the pitfalls of the FTCA can a tort plaintiff bring the federal government into court, and Houston stumbled on the six-month limitations period.

Conclusion

"The United States has the right to define the conditions under which it will be sued." Meeker, 435 F.2d at 1221. Having failed to meet one of those conditions, Houston's claim must be dismissed because the district court had no juris-

diction to hear it. The judgment must be reversed and the case dismissed.

REVERSED.

II. Denial of Petition for Rehearing and Suggestion for Rehearing En Banc.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 85 3639

ALTON J. HOUSTON,

Plaintiff-Appellee

Cross-Appellant,

versus

UNITED STATES POSTAL SERVICE, ET AL.,

Defendants-Appellants

Cross-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion August 13, 5 Cir., 1987, _____ F.2d ____) (September 23, 1987)

Before WISDOM, JOHNSON and GARWOOD, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED. . . .

ENTERED FOR THE COURT:

/s/ Witt Garwood

United States Circuit Judge

III. Minute Entry of United States District Court for the Eastern District of Louisiana.

MINUTE ENTRY

SEAR, J.

AUGUST 9, 1985

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

ALTON J. HOUSTON	*	CIVIL ACTION
VERSUS	*	NO. 80-1875
UNITED STATES OF AMERICA	*	SECTION "G"

Plaintiff initially brought this action on January 27, 1977 in Civil District Court for the Parish of Orleans to recover damages for injuries he allegedly sustained when the Sewerage and Water Board of New Orleans truck in which he had been sitting was struck by a United States Postal Service van driven by Joseph Howard, an employee of the Postal Service. Named as defendants in that action were

the United States, the United States Postal Service ("the USPS"), and Howard. None of the defendants were served with process at that time.

On April 21, 1980, plaintiff amended his state court complaint to assert that he had exhausted his administrative remedies under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq. Two days later he served the United States and the USPS. These defendants removed to this court pursuant to 28 U.S.C. §§ 1441(a) and 1442(a)(1). Howard was finally served on August 19, 1980.

The United States and the USPS moved to dismiss on the ground that this court lacked jurisdiction and that this action was time-barred because it was not commenced in federal court within six months after plaintiff's administrative claim was denied. I found that I lacked jurisdic-

tion over the USPS and therefore granted the motion as to that party. However, because I found that the provisions of the Federal Drivers Act, 28 U.S.C. § 2679(b)-(e) applied to plaintiff's claim against Howard, the United States was automatically substituted as defendant in place of Howard by operation of law. Consequently, I found that I had jurisdiction over the United States.

Although this action was not commenced in federal court within six months after plaintiff's administrative claim was denied, I found that under the circumstances of this case, plaintiff's claim was not time-barred. I therefore denied the motion of the United States to dismiss.

On July 22, 1985, nearly two months after trial of this action was completed, the United States once again moved to

dismiss for lack of jurisdiction. The grounds urged by the United States in support of its motion are substantially similar to those asserted in its first motion to dismiss. Accordingly, this motion must be denied for the same reasons stated in this court's order of December 8, 1980.

Trial of this matter was held on April 15-17, 1985. Based upon the evidence, memoranda of counsel, and the law applicable to this case, I make the following Findings of Fact and Conclusions of Law.

Findings of Fact

I.

Plaintiff, Alton J. Houston, is 47 years old, single, with two children. His children, however, do not live with him. He has ten years of formal education.

II.

Plaintiff is not licensed to drive a motor vehicle.

III.

Plaintiff was employed by the Sewerage and Water Board of New Orleans beginning on November 5, 1973.

IV.

On January 27, 1976, while still employed by the Sewerage and Water Board of New Orleans, plaintiff was sitting in the right front seat of a truck owned by his employer and parked on St. Charles Avenue.

V.

The truck was parked a distance from the curb such that it occupied nearly one-half of the left traffic lane.

VI.

Joseph Howard, then an employee of the United States Postal Service acting within the course and scope of his employ-

ment, was driving a van owned by the Postal Service down the left traffic lane of St. Charles Avenue in heavy traffic that was moving at approximately five to ten miles per hour.

VII.

Joseph Howard saw that the left traffic lane was partially blocked by the Sewerage and Water Board truck and began to move over to the right traffic lane to avoid hitting the truck.

VIII.

At about the same time, the car in the right traffic lane immediately in front of Joseph Howard's Postal Service van stopped and began backing into a parking place on the right side of St. Charles Avenue. The car was at least one-half car length in front of the Postal Service van and there was very little space between the van and the car following it.

IX.

Joseph Howard attempted to drive the Postal Service van between the Sewerage and Water Board truck which partially blocked the left lane and the car backing in the right lane.

X.

As the postal vehicle passed the truck in which plaintiff was seated, the left hand side-view mirror of the Postal Service van struck the right hand side-view mirror of the Sewerage and Water Board truck, shattering the mirror on the Sewerage and Water Board truck.

XI.

The truck had been parked by an employee of the Sewerage and Water Board other than plaintiff. He was issued a traffic citation for having parked more than 18 inches from the curb.

XII.

Immediately after the collision, plaintiff complained of burning in his eye and of neck pain and was taken to Southern Baptist Hospital for examination. That examination did not reveal any physical injury from the collision.

XIII.

Nevertheless, since that time, plaintiff has complained of head, neck, shoulder, low back and right leg pain, as well as numbness in his right leg. The low back pain reoccurs whenever he attempts to lift anything heavy. Plaintiff has also complained that his right leg occasionally "gives way," causing him to fall.

XIV.

Plaintiff was examined on February 10, 1976 by David W. Aiken, Sr., M.D., a member of the faculty at Tulane Medical School in the department of surgery. Dr.

Aiken found tenderness in various muscles of plaintiff's neck, and a little limitation of rotation and tilting of his neck. Dr. Aiken also found tenderness in the lumber [sic] muscles of plaintiff's back, especially on the right side where he observed some spasm. There was questionable tenderness in plaintiff's right sciatic nerve, and plaintiff tested positive on two tests designed to indicate disc injury (e.g., the straight leg raising test and the Spurling maneuver). Plaintiff also displayed hypoesthesia or numbness over various areas of his right leg.

XV.

Dr. Aiken concluded that plaintiff had a moderate acute cervical sprain, a severe lumbosacral sprain, and right sciatic nerve irritation which suggested the possibility of lumber [sic] disc herniation. At that point, Dr. Aiken believed

plaintiff to have been disabled from working.

XVI.

Dr. Aiken treated plaintiff with infrared heat and ultrasound, and by March 18, 1986, the tenderness in the muscles of plaintiff's neck had disappeared. A lumbar thermogram showed an area of increased heat over plaintiff's right sacroilliac joint, which Dr. Aiken testified was consistent with the pain plaintiff was experiencing from his right leg and the right side of his low back. Dr. Aiken prescribed anti-inflammatory medication and continued treatment of plaintiff.

XVII.

On September 14, 1976, Dr. Aiken referred plaintiff to the psychiatric clinic of Charity Hospital because plaintiff had begun to drink excessively.

XVIII.

Dr. Aiken continued to treat plaintiff regularly through September 27, 1978. Thereafter, he saw plaintiff again on November 14, 1980 and on February 7, 1985. Based on his nine years of treating plaintiff, Dr. Aiken testified that he "never felt in any way that [plaintiff] was a malingerer," and that plaintiff had suffered a lumbosacral disc injury that had "burned out" or resolved itself such that plaintiff experiences chronic, but intermittent pain. He also testified that plaintiff was completely disabled through 1979 and from that time has been ten to twenty percent disabled because of his problems with his back.

XIX.

Prior to the collision, plaintiff drank alcohol primarily on the weekends, and then only moderate amounts of beer. About nine or ten months after the col-

lision, plaintiff's concern for his condition and his lack of a job lead him to begin heavy drinking -- at least a pint, usually of whiskey, per day.

XX.

Plaintiff was admitted to the detoxification clinic at Charity Hospital for two weeks of treatment for preliminary delirium tremens in August, 1977.

XXI.

Plaintiff returned to the Charity Hospital detoxification clinic on January 6, 1984, and when he was discharged on January 13, 1984, he was referred to the New Orleans Substance Abuse Clinic. Plaintiff was thereafter admitted to that clinic on January 18, 1984 for treatment for "alcohol abuse" and for "bad nerves." Plaintiff has drunk no alcohol since January, 1984.

XXII.

Richard Levy, M.D., who performed a neurosurgical examination upon plaintiff on November 8, 1978, testified that he discovered two abnormalities in his examination of plaintiff: (1) slight tenderness over the plaintiff's low back region; and (2) hypoestheia [sic]or numbness in a stocking distribution over plaintiff's right leg. Although Dr. Levy found no organic neurological basis for plaintiff's symptoms, he concluded that nothing in his examination of plaintiff indicated that plaintiff was not truthful in describing his symptoms. Indeed, Dr. Levy testified that he sees patients with stocking distribution numbness for which there was no organic cause "all the time," and that the symptoms are "just as real to [the patient] as if there had been a physical or organic basis."

XXIII.

Dr. Levy also treats patients who experience low back pain, yet have no apparent organic disease. Such patients respond similarly to patients who have an untreatable pain-causing organic ailment -- they became uptight and anxious, or despondent and depressed.

XXIV.

Plaintiff was given psychiatric examinations on April 27, 1981, June 22, 1984, and January 10, 1985 by Alvin Cohen, M.D., who testified that he found plaintiff to be sincere and well-motivated and to relate in an open and honest manner. Dr. Cohen further found plaintiff's memory to be generally good, except that his memory for detail was not clear. Dr. Cohen described plaintiff as being depressed with a lot of tension, intermittently insomniac, and having dizziness, headaches and back and neck pain. Dr.

Cohen found plaintiff to be preoccupied with the accident, and markedly focused on his neck, back, shoulders and head.

XXV.

Dr. Cohen testified that plaintiff exhibits symptoms of both moderate to severe anxiety and depression, but he found no gross evidence of psychosis or any evidence of delusions or hallucinations. Dr. Cohen diagnosed plaintiff as having a generalized anxiety disorder with some depression which was precipitated by the collision that occurred in 1976. Dr. Cohen also found that the accident lead to heavy drinking by plaintiff.

XXVI.

Although Dr. Cohen did not diagnose plaintiff as having a passive-dependent personality, he testified that plaintiff could have been so diagnosed. He further testified that diagnosis of such a per-

sonality was irrelevant in this case because it had "nothing to do with plaintiff's symptoms."

XXVII.

Dr. Cohen's testimony was that plaintiff would not benefit from psychotherapy but that he could benefit from the use of anti-depressant medication. Even with treatment, however, Dr. Cohen found that plaintiff's prognosis for improvement is less than 50 percent.

XXVIII.

Finally, Dr. Cohen testified that plaintiff would have difficulty doing any type of gainful activity, and that plaintiff's present employment in a laundary [sic] for two or three hours a day about three days a week is "the extent of his ability to function in the work world."

XXIX.

F. William Black, Ph.D., an associate

professor of neurology and director of the Neuropsychology Laboratory at the Louisiana State University School of Medicine in New Orleans, testified that he gave plaintiff a neuropsychological examination on June 18, 1984. Professor Black described plaintiff as candid, open, verbal, not malingering, not holding back, no attempting to maximize his discomfort or problems, and not telling a story.

XXX.

Based on plaintiff's performance on a number of specific tests, Professor Black found plaintiff to have a low intellectual level (e.g., Peabody I.Q., 66; WAIS-R, 75) and to be at the borderline or below in other measures (e.g., Boston Naming, Wexler (cognitive), Randt (memory)). Professor Black determined plaintiff's mild inability to describe problems and mild incomprehension to be secondary to

his reduced intellectual level. Plaintiff's performance on various pschomotor tests (finger tapping, grip strength and tactile sensitivity) indicated to Professor Black that plaintiff is depressed, but the depression is not necessarily indicative of emotional trauma. Plaintiff tests as distinctly abnormal on the MMPI, having significant depression, ruminitive anxiety and hyperchondresis.

XXXI.

Professor Black found that plaintiff shows an over-concern with his physical symptoms and over-reacts to minor pain. However, Professor Black found that the pain is as real to plaintiff "as if he had broken his arm."

XXXII.

Professor Black testified that plaintiff's excess drinking was directly

related to the emotional trauma he sustained in the accident.

XXXIII.

Professor Black diagnosed plaintiff as having an exaggerated emotional reaction to his perception of his problems after the collision or, in other words, post-traumatic stress disorder.

XXXIV.

Professor Black concluded that plaintiff is significantly disabled and that because of his low general intellect and the length of time that his symptoms have existed, his prognosis for improvement is not good.

XXXV.

Only one witness, Renee Culver, M.D., testified on behalf of the government. Dr. Culver diagnosed plaintiff as having alcoholism (in remission), psychogenic pain disorder and a passive-dependent

personality.

XXXVI.

Dr. Culver's diagnosis of psychogenic pain disorder was premised on the discrepancy between the plaintiff's physical distress and Dr. Culver's opinion, formed after reading the reports of the physicians who had examined plaintiff, that there was no organic basis for plaintiff's pain.

XXXVII.

Dr. Culver found that plaintiff's personality was passive-dependent because, in his view, plaintiff has a history of passively allowing others to take control of major areas of his life, sees himself as helpless, has an erratic work history, and is an alcoholic.

XXXVIII.

Apparrently [sic] based on his characterization of plaintiff's personality as

passive-dependent and his opinion that plaintiff's work history was erratic, Dr. Culver found that plaintiff dislikes work and that he wants someone to care for him.

XXXIX.

In contrast to the other witnesses, Dr. Culver concluded in his report that plaintiff's present level of functioning and his alcoholism do not bear any direct or indirect relationship to the collision. Instead, Dr. Culver characterizes the collision and the pain that plaintiff experiences as an excuse that plaintiff has used to avoid working. Nevertheless, Dr. Culver testified at trial that plaintiff's psychogenic pain disorder is "related" to the accident.

XL.

In addition to its internal inconsistency, Dr. Culver's testimony is inconsistent with virtually all of the other medi-

cal evidence presented in this case. No other witness believed plaintiff to be malingering or using the collision as an excuse for not working. All believed him to have been truthful in his description of his symptoms.

XLI.

Moreover, notwithstanding Dr. Culver's characterization of plaintiff's work history as erratic, plaintiff testified that although he has held a series of jobs, he had been steadily employed with no period of unemployment longer than one month. Furthermore, plaintiff has never applied for or received unemployment compensation benefits. Finally, plaintiff's expert in personnel placement, Pierre C. Barrios, testified that plaintiff's work history was not unusual for someone having plaintiff's qualifications.

XLII.

Dr. Culver's opinion that plaintiff does not like work is also contradicted by the testimony of two of plaintiff's former supervisors, Philip DeSalvo and Floyd J. Duet, and his present employer, Thomas Chin, who all testified that they considered plaintiff to be a good worker who had no attendance problems.

XLIII.

Subsequent to the collision, in 1978, plaintiff attempted to return to his former job with the Sewerage and Water Board. Plaintiff had to leave work before the end of the day because of pain. Subsequently, plaintiff worked part-time at a liquor store as a clerk but his employment ended when the store ceased business. Thereafter, he has worked at Wah Cleaners, where he had been employed as a dry cleaner for several years in the early

1970s.

XLIV.

Plaintiff presently works for Wah Cleaners two to three hours per day, usually five days per week doing light work like sweeping and cleaning. Plaintiff is paid approximately forty dollars per week. Plaintiff was given this employment by the owner of the cleaners because he knew plaintiff was a reliable employee and because the owner felt obliged to assist his former employee.

XLV.

Pierre C. Barrios, who was qualified as an expert in personnel placement, testified that plaintiff was not commercially employable in the New Orleans labor market. Indeed, Mr. Barrios stated that he would not accept plaintiff as a client for placement because he believed that the chance of finding him employment was

"almost nil." Mr. Barrios stated that his conclusion was based at least in part on plaintiff's physical limitations, his lack of formal education, and inability to drive a motor vehicle.

XLVI.

Nevertheless, plaintiff's employment with the liquor store and the cleaners, together with the testimony of Drs. Cohen, Aiken, and Professor Black, indicates that plaintiff is capable of performing light work. Moreover, plaintiff's present employer, Mr. Chin, testified that plaintiff wanted to work more, but he had no more work available for plaintiff. Plaintiff has made no other effort to seek additional employment. I therefore find that plaintiff is capable of full-time employment earning the minimum wage.

XLVII.

Based on the testimony of Drs. Aiken

and Levy, I find that plaintiff sustained an actual, physical injury from the collision which disabled him from working through 1979. I further find that plaintiff continues to be 20 percent disabled because of the injury to his back.

XLVIII.

I find that plaintiff suffers from mild to borderline mental retardation and that this rendered him susceptible to decompensation from some environmental stimulus. The collision was such a stimulur [sic], and I find that as a result of the collision, plaintiff sustained an emotional injury in the nature of a post-traumatic stress disorder or a psychogenic pain disorder. This emotional injury has caused plaintiff to experience chronic pain, to become depressed and anxious, and to drink excessively for eight years. As a result of this injury, I find that

plaintiff is partially, but permanently disabled.

XLIX.

The parties stipulated to the expertise of Melville Z. Wolfson in the field of economics. Professor Wolfson testified that after subtracting $3,300 he had earned since the collision in 1976, and assuming that plaintiff was taxed as a head of a household, plaintiff had (after tax) lost wages in the amount of $73,903. Professor Wolfson also testified, that on the assumptions that plaintiff is unable to return to gainful employment, he has a work life expectancy to age 61.7, a 5.76 percent annual increase in earning capacity (after adjustment for age), he will earn fringe benefits equal to eight percent of wages, and that the discount rate if 7.4 percent that the present value of plaintiff's future (after tax) lost wages

is $134,584. Alternatively, Professor Wolfson testified that plaintiff's earning capacity at the time of trial was $11,010 per year and that his future (after tax) lost wages can be calculated at $12,213 for each $1,000 of lost earning capacity.

L.

Because Professor Wolfson's calculations assumed that plaintiff was totally disabled, I requested additional information from Professor Wolfson so that I could determine plaintiff's damages if I found him to be only partially disabled. I asked that he prepare an additional report indicating plaintiff's lost wages for each year since the collision and the applicable minimum hourly wage. Together with that information, Professor Wolfson provided tables for use in calculation of the appropriate federal income tax. Certain of the tables, however, are applica-

ble only to the head of a household and cannot be used where, as here, the individual being taxed does not have children who live with him. Therefore, where the appropriate table was not provided, I have calculated the federal income tax based on the rate of tax in effect under 26 U.S.C. § 1(c) during each of the years since 1976.[1] For 1976, the appropriate tax was

---

[1] The tax tables are prescribed by the Secretary of the Treasury under 26 U.S.C. § 3 using the rates prescribed in 26 U.S.C § 1. 26 U.S.C. § 3(a)(1). For the years 1982-1985, the tax was calculated using the rates established in 26 U.S.C. § 1(c) (1983). For the years 1979-1981 and 1977-1978, the tax was calculated using the rates

found in the tax table.

LI.

Professor Wolfson estimates that plaintiff's past (pre-tax) lost wages for the years 1976-1979 total $27,992. After reduction for tax as described in the above paragraph, I find that plaintiff's past (after tax) lost wages for those years are $24,954. Professor Wolfson estimates that for the years from 1980 until the time of trial, plaintiff's past (pre-tax) lost wages are $54,250. Because I found that plaintiff is capable of full-time employment earning the minimum hourly wage, and has been since 1980, the $54,250 must be reduced by $34,950, the amount

---

established in Pub. L. No. 95-600, Title I, § 101(a), 92 Stat. 2767 (1978) and Pub. L. No. 95-30, Title I, § 101(a), 91 Stat. 127 (1977), respectively.

plaintiff could have earned had he worked 2,000 hours per year (50 weeks x 40 hours per week) at the minimum wage. Plaintiff's past lost wages are therefore $19,300 (pre-tax) and $15,960 (after tax).[2] Thus, plaintiff's total past (after tax) lost wages are $40,914.

LII.

Plaintiff's future lost wages may be calculated using the formula provided by Professor Wolfson at trial ($12,213 for each $1,000 loss of earning capacity). Plaintiff's earning capacity according to Professor Wolfson was $11,010. His present earning capacity is $6,700 (40 hours per week x 50 weeks per year x 3.35 per

---

[2] The tax was calculated by applying the appropriate marginal rates to the amount representing plaintiff's lost income for each year.

hour). Plaintiff's lost earning capacity is therefore $4,310. Application of Professor Wolfson's formula reveals that plaintiff's future (after tax) lost wages to be $52,638.

LIII.

Plaintiff has paid medical expenses of $2,045.20 for his two admissions to Charity Hospital detoxification clinic. Plaintiff has also paid a total of $1,290.00 in physicians' fees for treatment and evaluation of the injuries sustained as a result of the collision.

LIV.

Plaintiff's pain and suffering may be compensated by an award of $25,000.00.

Conclusions of Law

I.

This action is within the jurisdiction of this Court under the Federal Drivers Act, 28 U.S.C. § 2679, the Federal

Tort Claims Act, 28 U.S.C. § 2671 et seq., and 28 U.S.C. § 1331.

II.

This Court has jurisdiction over the parties and venue is proper in the Eastern District of Louisiana.

III.

For the reasons stated in this court's order of December 8, 1980, I find that this action was brought within the time limitations of the Federal Tort Claims Act.

IV.

Joseph Howard was negligent in the operation of the Postal Service van.

V.

The negligence of Joseph Howard was the proximate cause of the collision of the Postal Service van with the Sewerage and Water Board truck.

VI.

The United States is liable for the negligence of Joseph Howard under the Federal Drivers Act and the Federal Tort Claims Act because he was acting in the course and scope of his employment.

VII.

Plaintiff was not contributorily negligent.

VIII.

Any negligence attributable to the Sewerage and Water Board from the improper parking of its truck is irrelevant to plaintiff's claim against the United States.

IX.

Plaintiff is entitled to recover damages from the defendant in the amount of $121,887.20.

/s/ Morey L. Sear

UNITED STATES DISTRICT JUDGE

IV. Judgment of the United States District Court for the Eastern District of Louisiana.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

ALTON J. HOUSTON	CIVIL ACTION
VS	NO. 80-1875
UNITED STATES OF AMERICA, ET AL	SECTION "G"

J U D G M E N T

For written reasons herein;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Alton J. Houston, and against defendants, United States Postal Service and United States of America in the amount of $121,887.20 with interest from date of judicial demand.

Dated at New Orleans, Louisiana, this 13th day of August, 1985.

LORETTA G. WHYTE, CLERK

BY CHIEF DEPUTY CLERK

APPROVED AS TO FORM:

/s/ MOREY L. SEAR

UNITED STATES DISTRICT JUDGE

V. Amended Judgment of the United States District Court for the Eastern District of Louisiana.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

ALTON J. HOUSTON	CIVIL ACTION
VS	NO. 80-1875
UNITED STATES OF AMERICA, ET AL	SECTION "G"

A M E N D E D J U D G M E N T

For written reasons herein;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Alton J. Houston, and against defendants, United States Postal Service and United States of America in the amount of $121,887.00.

New Orleans, Louisiana, this 6th day of September, 1985.

/s/ LORRETA G. WHYTE

LORETTA G. WHYTE, CLERK

APPROVED AS TO FORM:

/s/ MOREY L. SEAR

UNITED STATES DISTRICT JUDGE

VI. Order of the United States District Court for the Eastern District of Louisiana.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

ALTON J. HOUSTON	*	CIVIL ACTION
	*	
versus	*	NO. 80-1875
	*	
UNITED STATES OF AMERICA	*	SECTION G (5)
	*	

****

ORDER

IT IS ORDERED, ADJUDGED AND DECREED that the motion to dismiss for failure to prosecute brought under Federal Rule of Civil Procedure 41(b) by the defendant United States of America is hereby denied on October 2, 1981.

/s/ Morey L. Sear

UNITED STATES DISTRICT JUDGE

VII. Opinion of United States District Court for the Eastern District of Louisiana.

MINUTE ENTRY

SEAR, J.

December 8, 1980

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

ALTON J. HOUSTON	*	CIVIL ACTION
versus	*	No. 80-1875
UNITED STATES POSTAL SERVICE, ET AL	*	SECTION "G"

Defendants United States and United States Postal Service (USPS) bring this motion to dismiss or for summary judgment, contending that I lack subject matter jurisdiction over the action. Because I conclude that I can exercise jurisdiction over the United States, I deny the motion as to it; however, I grant the motion as to USPS.

Plaintiff Alton Houston was sitting in a Sewerage and Water Board truck parked on a City of New Orleans street on January 27, 1976 when it was struck by a USPS truck driven by Joseph Howard, a postal employee. Exactly one year later, Houston commenced suit in the Civil District Court for the Parish of Orleans naming as defendants the United States, USPS, and Howard. None of the defendants was served with process at that time. Less than a year later, on January 17, 1978, Houston filed an administrative claim with USPS alleging that he had suffered injuries from the collision. On April 26, 1978 USPS denied the claim and advised Houston of his right to sue the Government in federal court within six months. Houston did not commence a federal action, but almost two years later, on April 21, 1980, he amended his still pending state complaint to

assert that he had exhausted his administrative remedies. At that time, the complaint had still not been served on the defendants. Then, on April 23, 1980, Houston served the United States and USPS. On May 21, 1980, the federal defendants removed the suit to federal court pursuant to 28 U.S.C. §§ 1441(a) and 1442(a)(1). Finally, on August 19, 1980, Howard was served with the complaint.

The United States and USPS move to dismiss this action on two grounds, both related to this court's jurisdiction over the action. The Government argues that because the state court lacked jurisdiction over the suit, so do I upon removal. Alternatively, it is contended, even if I could otherwise exercise jurisdiction, the suit is time-barred because it was not commenced in federal court within six months after Houston's administrative

claim with USPS was denied.[1]

A federal court has jurisdiction over an action removed from state court only if the state court had jurisdiction. Minnesota v. United States, 305 U.S. 382, 389, 59 S. Ct. 292, 295, 83 L. Ed. 235 (1939). United States District Courts have exclusive jurisdiction over actions brought against the United States for the torts of its employees. 28 U.S.C. § 1346(b). In addition, only the United States, and not USPS, may be sued for the torts of postal workers. 28 U.S.C. § 2679(a); Myers & Myers, Inc. v. U.S. Postal Service, 527 F.2d 1252, 1256 (2d Cir. 1975); Grasso v. U.S. Postal Service, 438 F.Supp. 1231, 1236 (D. Conn. 1977). Houston argues that 39 U.S.C. § 409(a)[2] grants original but not exclusive jurisdiction in United States District Courts over actions brought against USPS, and

therefore the state court did have jurisdiction over the claim against USPS. But since there is no cause of action against USPS for the torts of its employees, no court, whether state or federal, can exercise jurisdiction over a suit asserting such a claim. Therefore, to the extent that Houston's state complaint was brought directly against the United States and USPS, because the state court lacked jurisdiction, so does this court upon removal.

But Houston also sued Howard, and over that tort claim the state court could exercise jurisdiction. The Federal Drivers Act, 28 U.S.C. § 2679(b)-(e), provides that state actions brought against federal employees for injuries caused by their operation of motor vehicles may be removed to federal court upon a certification by the Attorney General

that the employee was acting within the scope of his employment. Upon removal, the United States is substituted for the driver as the defendant in the action, and the proceeding is deemed one against the United States under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq. Therefore, if the Federal Drivers Act applies in this case, I can exercise jurisdiction over the United States for a claim originally asserted against its employee in state court.

The Act states:

> (b) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office

or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

(c) The Attorney General shall defend any civil action or proceeding brought against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall

promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d) Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title

and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in Section 2677, and with the same effect.

I note that two requirements of the Act have not been satisfied here. First, under § 2679(c), Howard was required to deliver to USPS the process served upon him while the action was pending in state court. Howard was not served until after

USPS was served, and after the action had been removed; therefore he could not have delivered the process served upon him in accordance with the statute. But this is not a fatal deficiency, since the purpose of § 2679(c), to inform the Government of pending state actions against its employees, was satisfied. The United States and USPS knew as much about the suit when they were served with the complaint as they would have had Howard been served first and delivered the papers to the Government as provided under the statute.

Second, the Attorney General has not issued a certification that at the time of the accident, Howard was acting within the scope of his employment. Indeed, when removing this action from state court, the Government did not formally invoke the Federal Drivers Act but instead relied on

the general removal statutes. I note that the decision to certify that a federal driver was acting within the scope of his employment at the time of an injury has been held to rest within the discretion of the Attorney General, and a court will not ordinarily issue a writ of mandamus to compel exercise of that power. Seiden v. United States, 537 F.2d 867 (6th Cir. 1976); Lemley v. Mitchell, 304 F. Supp. 1271 (D.D.C. 1969).

But the lack of a formal certification from the Attorney General should not preclude my exercising jurisdiction over this suit. The United States has conceded, in its response to the plaintiff's request for admissions, that Howard was acting within the scope of his employment as a postal truck driver on the day of the collision; thus, the provisions of the Federal Drivers Act should apply. Cer-

tainly the Attorney General's certification does not establish a court's jurisdiction, for the statute plainly provides that if it is determined that in fact the driver was not acting within the scope of his employment, the action must be remanded to state court. 28 U.S.C. § 2679(d). See also Seiden v. United States, supra; Lemley v. Mitchell, supra. And if the action is originally commenced in federal court, the requirement of certification does not apply at all. Jones v. Polishuk, 252 F. Supp. 752 (E.D. Tenn. 1966). Finally, once properly removed to federal court, the suit proceeds as one against the United States, with the Government substituted as the defendant by operation of law; no formal motion is required. Whistler v. United States, 252 F. Supp. 913 (N.D. Ind. 1966).

Rather than determining a court's

jurisdiction, the Attorney General's certification serves the purpose of allowing the Government to control which actions are removed from state court to the federal system. Clearly the driver who is sued in state court has a significant interest in seeing the action removed to federal court, since he would thereby be absolved of any personal liability for his tortious conduct. 28 U.S.C. § 2679(b). Similarly the United States has an important interest in preventing the removal of cases to which the Act is inapplicable, i.e., cases where the driver acted beyond the scope of his employment. But where, as here, the Government, which was fully aware of the nature of the suit, has made the decision to remove it to federal court, and acknowledged that its employee was acting within the scope of his governmental duties at the time of the injury,

to insist on some official certification from the Attorney General to that effect would emphasize form over substance without reason.

Therefore, I can exercise jurisdiction over the claim against the United States for the alleged torts of Howard, even though it was originally brought in state court.

Alternatively, the Government argues that even if the suit is otherwise properly before me, it is time-barred. Title 28, U.S.C. § 2401(b) states:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of

notice of final denial of the claim by the agency to which it was presented.

Although Houston filed a timely administrative claim with USPS, he did not commence a federal action within six months after the claim was denied. However, his state action was pending throughout that time, and several courts have held that filing suit in state court tolls the statute of limitations for the Federal Drivers Act. McGowan v. Williams, 623 F.2d 1239 (7th Cir. 1980); Kelly v. United States, 568 F.2d 259 (2d Cir.), cert. denied, 439 U.S. 1018, 99 S. Ct. 106, 58 L. Ed. 2d 124 (1978); Henderson v. United States, supra; Reynaud v. United States, 259 F. 945 (W.D. Mo. 1966); Whistler v. United States, supra. The Fifth Circuit has not yet addressed this issue. It could be argued that under a

literal reading of § 2401(b), Houston was required to recommence his action after the administrative claim was denied; that is what the plaintiff did in McGowan, although the court specifically declined to rule whether recommencement of the action is required by § 2401(b). 623 F.2d at 1241 n.3. But under the facts of this case, it would have been unreasonable to have required Houston to refile, for by the time his administrative claim was denied, a new action against Howard, commenced more than two years after the collision, would have prescribed under state law. Article 3536, Louisiana Civil Code (one year limitation on actions brought for "offenses" and "quasi-offenses"). To be sure, Houston could have commenced an action in federal court, but in so doing he would have run the risk that if Howard were found to have been acting beyond the

scope of his employment, the suit would have been dismissed, leaving Houston without any remedy. And since the Federal Drivers Act clearly provides for suits of this nature to be brought in state court, I cannot conclude that Houston was required to bring two suits, one in state court against Howard, and one in federal court against the United States.

Nevertheless, the Government argues that Houston's state court action cannot be deemed to have tolled the statute of limitations because process was not served on the defendants until more than three years after the suit was filed, and almost two years after the administrative claim was denied. This delay, the Government contends, deprived it of the timely notice to which it was entitled under § 2401(b). However, nothing in § 2401(b) provides that the statute of limitations for tort

claims is tolled by service of process; it mandates only that an action be "begun" within a certain time. Under Rule 3, Federal Rules of Civil Procedure, "[a] civil action is commenced by filing a complaint with the court."[3] Several courts have held that the filing of a complaint, and not the service of process, tolls a statute of limitations. United States v. Wahl, 583 F.2d 285 (6th Cir. 1978); Metropolitan Paving Co. v. International Union of Operating Engineers, Inc., 439 F.2d 300, 306 (10th Cir.), cert. denied, 404 U.S. 829, 92 S. Ct. 68, 30 L. Ed. 2d 38 (1971); Moore Co. of Skeston, Mo. v. Sid Richardson Carbon & Gas Co., 347 F.2d 921 (8th Cir. 1965); Ratcliffe v. Insurance Co. of North America, 482 F. Supp. 759, 763 (E.D. Pa. 1980); Preston v. Mendlinger, 83 F.R.D. 198 (S.D.N.Y. 1979); Weaver v. United California Bank, 350 F.

Supp. 1373 (N.D. Cal. 1972); McCrea v. General Motors Corp., 53 F.R.D. 384 (D. Mont. 1971). The Supreme Court has not yet addressed this issue, Walker v. Armco Steel Corp., ____ U.S. ____, ____ n.11, 100 S. Ct. 1978, 1985 n.11, 64 L. Ed. 2d 659 (1980); nor has the Fifth Circuit. Shelley v. Bayou Metals, 561 F.2d 1209, 1210 (5th Cir. 1977). At least one judge in this district has indicated his view that unless the Government is served with a complaint reasonably soon after it is filed, the statute of limitations is not tolled. Tyrolf v. Veterans Administration, 82 F.R.D. 372, 375 (E.D. La. 1979) (Schwartz, J.).[4] But the approach of Wahl and the other cases cited above is preferable, for it offers a simple method for determining when a statute of limitations is tolled. In addition, the defendant who is served after the applicable period

expires is not left without a remedy: Under Rule 42(b), Federal Rules of Civil Procedure, he may move to dismiss the action for failure to prosecute.

On such a motion, the relevant factors are the length of delay in service; the plaintiff's due diligence in attempting to effect service; and the actual prejudice caused to the defendant by the delay. Preston v. Mendlinger, supra. Although Houston discussed Rule 41(b) in his memorandum in opposition to the motion to dismiss, the Government did not base its motion on that ground. Therefore, it would not be proper to assess the merits of such a claim at this time. Accordingly,

IT IS ORDERED that the motion to dismiss is GRANTED as to USPS, but as to the United States it is DENIED.

IT IS FURTHER ORDERED that Joseph

Howard be dismissed from this action, having been replaced as a defendant by the United States.

/s/ Morey L. Sear

MOREY L. SEAR

UNITED STATES DISTRICT JUDGE

FOOTNOTES

1. The Government also contends that service of process in this case was defective because a copy of the complaint and summons was not sent to the Attorney General in accordance with Rule 4(d)(4), Federal Rules of Civil Procedure. However, Houston has demonstrated that he has complied with the rule by delivering a copy of the complaint and summons to the Attorney General on April 28, 1980; therefore this contention is without merit.

2. 39 U.S.C. § 409(a) states:

> Except as provided in section 3628 of this title, the United States district courts shall have original but not exclusive jurisdiction over all actions brought by or against the Postal Service. Any action brought

in a state court to which the Postal Service is a party may be removed to the appropriate United States district court under the provisions of Chapter 89 of Title 28.

3. Similarly, Louisiana law provides that prescription is interrupted merely by filing a complaint in a court of competent jurisdiction and proper venue. La.R.S. 9:5801. Although, as discussed above, the state court lacked jurisdiction over the United States and USPS, and so prescription was not interrupted as to them as direct defendants, it was as to Howard, over whom the state court did have jurisdiction, and thus also as to the United States in accordance with the Federal Drivers Act.

4. The Government cites the Fifth Circuit's decision in Carr v. Veterans Administration, 522 F.2d 1355 (5th Cir.

1975), as authority for its view that only service of process tolls the statute of limitations. However, that case is inapposite to the facts before me. In Carr, the plaintiff had mistakenly sued the Veterans Administration for the malpractice of one of its doctors under the Federal Tort Claims Act. The plaintiff sought to correct her error by amending the complaint to name the United States as defendant, but the amendment was filed after the six-month period for commencing an action under the Act had elapsed. 28 U.S.C. § 2401(b). The plaintiff attempted to overcome this by arguing that under Rule 15(c), Federal Rules of Civil Procedure, her amendment "related back" to the original complaint, and therefore was timely filed. The Fifth Circuit rejected this contention on the ground that because the original complaint

had not been served on the United States until after the six-month period, the Government did not have actual notice of the suit within the statute of limitations period, and Rule 15(c) was inapplicable.

In Carr, however, there was no Federal Drivers Act which effectuates the substitution of the United States for the federal driver by operation of law. See Henderson v. United States, supra; Whistler v. United States, supra. The issue was purely one of amending a complaint under Rule 15(c).

STATUTES AND REGULATIONS

STATUTES:

28 U.S.C § 1346. United States as defendant

"(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance

with the law of the place where the act or omission occurred."

28 U.S.C. § 2401. Time for commencing action against United States

"(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented."

28 U.S.C. § 2675. Disposition by federal agency as prerequisite; evidence

"(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the

Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim."

28 U.S.C. § 2679. Exclusiveness of remedy

"(a) The authority of any federal agency to sue and be sued in its own name

shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

"(b) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

"(c) The Attorney General shall defend any civil action or proceeding

brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

"(d) Upon a certification by the Attorney General that the defendant employee was acting within the scope of

his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court.

"(e) The Attorney General may com-

promise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect."

REGULATIONS:

28 CFR § 15.3 Removal and defense of suits.

"(a) The U.S. Attorneys are authorized to make the certifications provided for in 10 U.S.C. 1089(c), 22 U.S.C. 817(c), 28 U.S.C. 2679(d), 38 U.S.C. 4116(c), and 42 U.S.C. 233(c) and 2458a(c) with respect to civil actions or proceedings brought against Federal employees in their respective districts. Such a certification may be withdrawn if a further evaluation of the relevant facts or the consideration of new or additional evidence calls for such action. The making, withholding, or withdrawing of certifications, and the removal and defense of, or

(1)

4.

1)

the refusal to remove and defend, such civil actions or proceedings by the U.S. Attorneys shall be subject to the instructions and supervision of the Assistant Attorney General in charge of the Civil Division."